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Supreme Court of the United States

OCTOBER TERM, 1997

PAUL A. DUKE, INDIVIDUALLY AND AS TRUSTEE FOR TERRI L. STRICKLAND, JEAN F. DUKE, PAUL A. DUKE, JR., C. HUNTER TISON, LAURA D. TISON, RUTH STRICKLAND, HERB STRICKLAND, JON A. PIRTLE, RONALD G. GREEN AND MATTHEW H. PATTON,

Petitioners,

v.

MARSHALL & CO., INC., KENTWOOD BRETT THACHSTON, MARSHALL & CO. SECURITIES, INC. AND MICHAEL P. MARSHALL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. SUMNER
Counsel of Record
SUMNER & ANDERSON
A Limited Liability Company
Suite 700, The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 588-9000

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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QUESTIONS PRESENTED

1. Whether a securities industry arbitration panel exceeds its authority by awarding attorneys' fees and costs on grounds which were not submitted by the parties?

2. Whether a securities industry arbitration panel can award attorneys' fees and costs on the grounds that the claims were brought in bad faith, despite acknowledging during the arbitration proceeding that the claims are colorable?

3. Whether a securities industry arbitration panel can assess attorneys' fees and costs jointly and severally against all claimants, without any showing or finding of individual culpability or bad faith?

4. Whether a securities industry arbitration panel is guilty of misconduct within the meaning of 9 U.S.C. § 10(a)(3) by refusing to postpone and continue the arbitration hearing upon sufficient cause shown?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners and Respondents were the sole parties in the United States Court of Appeals proceedings.

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IN THE

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No. 97-

PAUL A. DUKE, INDIVIDUALLY AND AS TRUSTEE FOR TERRI L. STRICKLAND, JEAN F. DUKE, PAUL A. DUKE, JR., C. HUNTER TISON, LAURA D. TISON, RUTH STRICKLAND, HERB STRICKLAND, JON A. PIRTLE, RONALD G. GREEN AND MATTHEW H. PATTON,

Petitioners,

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MARSHALL & CO., INC., KENTWOOD BRETT THACHSTON, MARSHALL & CO. SECURITIES, INC. AND MICHAEL P. MARSHALL,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the decisions by the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Georgia, in this case.

OPINIONS BELOW

Petitioners brought securities fraud and other claims under both federal and state law against respondents, their brokers and brokerage firm. The claims were dismissed by an arbitration panel of the National Association of Securities Dealers ("NASD"). The panel then awarded the brokers and brokerage firm their attorneys' fees and costs, totaling $634,017.27, assessing the award jointly and severally against all of the investors. In a written opinion, the panel identified three purported sources of power it invoked to shift the attorneys' fees:

> The panel finds that its authority to award attorneys' fees and expenses is derived from three sources. First the parties agreed to submit the issue of attorneys' fees and expenses to the panel so that an enforceable "bi-lateral agreement" exists. *See Matter of U.S. Offshore, Inc. (Seabulk Offshore Ltd.),* 753 F. Supp. 86 (S.D.N.Y. 1990). Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American Rule." *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975); *Dean Witter Reynolds, Inc. v. Bork,* U.S. Dist. LEXIS 11907 (E.D. Pa. 1991). See also O.C.G.A. Section 9-15-14.

The district court granted the Respondents' petition to confirm (and simultaneously denied the Petitioners' petition to vacate) the award in arbitration pursuant to 9 U.S.C. § 10(a). The Court of Appeals affirmed *per curiam.*

STATEMENT OF JURISDICTION

This petition involves issues arising under the federal securities laws, including 15 U.S.C. § 78j(b) and Rule 10b-5, and the Federal Arbitration Act, 9 U.S.C. § 10.

This petition is timely, filed within 90 days of the decision by the Court of Appeals, which denied rehearing on September 11, 1997. This Court has certiorari jurisdiction pursuant to 29 U.S.C. § 1254.

FEDERAL STATUTES INVOKED

15 U.S.C. § 78j(b) provides in pertinent part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails . . .
>
> * * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The Federal Arbitration Act, 9 U.S.C. § 10, provides in part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
>
> * * * *
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the

> hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

STATEMENT OF THE CASE

Petitioners are ten individual investors, who believed they had been misled by their broker and broker/dealer about a stock issued by a company named Central Corporation ("Central"). Their broker/dealer was a market maker of Central stock. The investors believed that their broker had not followed their instructions to sell Central stock, and in fact encouraged them to buy or hold Central stock through misrepresentations about Central and its stock, including the broker/dealer's own investment strategy and position in Central stock.

Among other things, petitioners were never told that their broker/dealer was purposefully unloading Central stock from its own "house accounts" when it persuaded petitioners to buy Central stock. Moreover, the broker repeatedly assured the petitioners that respondents themselves held large positions in Central stock, and thus shared all risks along with the petitioners, when in fact the respondents were pushing hard to get rid of the stock by selling it to petitioners.

Additionally, the broker repeatedly assured petitioners that he was reducing his own compensation by giving them discounted commissions, when in fact his compensation was determined by the difference between the price he paid for Central stock when he bought it for the "house account" and the price he charged petitioners for the same stock. Petitioners proved that their broker paid significantly less for Central stock which he then sold, on the same day, to petitioners at inflated prices, all along assuring petitioners that he was selling to them

at "market" price and that his only compensation was discounted commissions.

These facts support, at the very least, colorable securities fraud claims.

Central ultimately went into bankruptcy. The bankruptcy plan called for a one for ten reverse stock split, a plan designed to enable the new management of Central's successor to obtain equity. The investors suffered substantial losses as a result, both in the value of their stock holdings (which fell from a high of nearly $10 to a low of less than $1) and in the diminution in the number of shares they held.

The investors were subsequently astounded when the owner of their broker/dealer was given a substantial equity position in Central's successor. In petitioners' eyes, their equity in Central had been given to the broker who had defrauded them about Central stock in the beginning.

Believing that they had been cheated both through their purchases and sales of Central stock, and by the fact that their equity interest had been substantially wiped out by Central's bankruptcy and given to their broker, the investors brought claims for fraud and for breach of fiduciary duty. Because of their contractual relationships with their broker/dealer, the only forum available to them was the security industry's own arbitration system. The ten individual investors filed three separate claims with the NASD. The claims were consolidated for purposes of the hearing only, with the express understanding that separate awards would be entered with respect to each individual claim.

A substantial investigative and discovery period ensued. Thousands of pages of documents were reviewed. Audio tapes which one investor had made of his conversations with the broker were transcribed and reviewed. Dozens of potential

witnesses were interviewed. The hearings themselves began over a year after the claims were filed.

Fifty-eight hearing sessions were convened, from February, 1992 through December, 1994. Two things particularly important to this certiorari petition occurred repeatedly during the lengthy hearings. First, the panel often acknowledged the weight and importance of the claims. For example, after over a year of proceedings, the panel chairman noted on the record:

> *Chairman Logue*: We've been together and been here too long to, I think, limit this process to something that may have been in the initial Statement of Claim. I think that there have been things that have developed along the way and have come out that need to be sifted through and need to be looked at by the arbitrators. . . . And unless my two cohorts up here overrule me, if it takes two more years to complete this case, then, you know, that's what we'll do. I don't want to cut anybody off, but I want to be fair to both parties, because this is a big case. This is an important case to all sides.

But the panel did cut the investors off. Throughout the proceedings, the panel often and consistently postponed sessions based on requests by the parties, their lawyers, and the panel members themselves. Each session began with a discussion about scheduling. It became a regular item on the agenda, raised by everyone. Until the last session, the panel approached scheduling in a consistent, nonarbitrary way, taking into consideration each and every participant's schedule, including the arbitrators' own schedules. In the end, however, the panel insisted that petitioners close their case, despite the fact that their lawyer had an irreconcilable conflict, and despite the fact that the federal judge who created the conflict asked the

panel in writing to understand.[1] The panel refused to postpone the closing of the investors' case, insisting that the investors close without the lawyer who had represented them throughout the proceedings.

The panel was guilty of misconduct for refusing to postpone the final session under these circumstances.

The panel then ignored the agreement to enter separate awards with regard to each investor. Instead, after dismissing all of the investors' claims, the panel awarded attorneys' fees and costs against all of the investors, jointly and severally, in an amount of nearly $650,00.00. Thus the individual investors — one of whom invested less than $10,000 in Central stock — now individually face enormous judgments. Although the panel gave three purported sources for its authority to assess attorneys' fees and costs against the investors — contractual authority, statutory authority, and the inherent authority to award fees for bad faith — the first two sources were clearly inapplicable. The only possible basis for the award was the investors' bad faith. Yet there was neither a showing nor a finding of bad faith.

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[1] The investors' lawyer was compelled by a federal district court judge to appear in an antitrust case in another state. The judge sought to facilitate the conflict, asking the panel in writing to understand:

> . . . Mr. Sumner [the investor's lawyer] is trying an antitrust case before me in Orlando, Florida, at the U.S. District Court for the Middle District of Florida. This case began on March 9, 1994 and will continue throughout this week. As lead counsel for the Plaintiff, it is necessary for Mr. Sumner to be present for this proceeding.
>
> Thank you for understanding this conflict.

Letter to the arbitration panel from The Honorable Louis C. Bechtle, dated April 13, 1994.

REASONS FOR GRANTING THE WRIT

Arbitration has become increasingly important to American jurisprudence. Courts encourage arbitration because it helps relieve some of the burden on the court system, and because it is sometimes quicker and less expensive than traditional litigation.

Along with this increased importance, however, must come an increase in the court's oversight responsibility, to safeguard the integrity of the entire system. Ultimately, courts are responsible for insuring that arbitration is fair.

Arbitration proceedings like this one are not fair. It was cut off despite a legitimate, documented conflict disclosed well in advance. Then, a very large attorneys' fees award was assessed against individual investors jointly and severally, without any showing or finding that any of the investors — either individually or as a group — acted in bad faith.

For arbitration to continue to be an effective forum for dispute resolution, there must be some accountability, to insure that it is fair and rational. Petitioners ask the Court to review the merits of this case because the issues presented by this petition are important to the arbitration system created by the securities industry, and to the effectiveness of arbitration generally as a dispute resolution mechanism.

In this case, an arbitration panel, convened by the securities industry, assessed an enormous award of attorneys' fees and costs against individual investors who claimed they were defrauded by a brokerage firm. This is *not* a case in which fees were assessed against a party committing fraud. This is *not* a case in which a brokerage firm was compelled to disgorge fraudulently obtained profits, and to pay the attorneys' fees incurred in forcing disgorgement. This is *not* a case in which the securities industry assessed a fee award in an effort

to police itself and its members. Rather, this is a case in which individual investors — who turned to a brokerage firm (and the securities industry) for help in investing, who then lost large sums of money on stock recommended by the brokerage firm, and who believed with good cause that they had been misled and cheated — are now required by a securities industry arbitration panel to pay, jointly and severally, the brokerage firm's attorneys' fees and costs, after the panel dismissed the individual's claims. Thus these investors suffer two losses.

Parties should be encouraged to arbitrate. In the securities industry, investors are required by contract to arbitrate any disputes; they must execute these contracts before they are allowed to invest. But a system which exposes individual investors, who have already suffered losses, to large attorneys' fees awards without regard to their individual conduct, is unfair. It is also unfair to force investors to close their case when the lawyer they chose to represent them is unavailable, due to a conflict beyond his control.

A. The Arbitrators Exceeded Their Authority, And Acted Arbitrarily And Capriciously, When They Shifted Attorneys' Fees And Expenses And Assessed Them Jointly And Severally Against The Individual Investors.

The NASD's arbitrator's manual adopts the American Rule regarding attorneys' fees: each party must bear its own fees and costs except in the following three extraordinary circumstances: (1) where the parties have expressly agreed otherwise; (2) where a statute authorizes otherwise; or (3) where the losing party commenced or maintained the arbitration in bad faith. *See Matter of Prudential Bache Securities, Inc.*, 814 F. Supp. 1081, 1083 (M.D. Fla. 1993) The panel identified these "three sources" as its authority to shift attorneys' fees to the investors in this case. But the parties to

this arbitration proceeding did not agree to shift fees, and no statute authorized the shifting of the brokers' fees to the investors. Thus, if the panel awarded fees on either of those two bases, it exceeded its authority. The only basis the panel had for shifting fees was that the investors acted in bad faith. But the panel acknowledged the importance of the investors' claims and encouraged them to pursue them "even if it takes two more years." Any conclusion that the claims were brought or maintained in bad faith is arbitrary and capricious.[2] Furthermore, it is arbitrary and capricious to assess nearly $650,000 in fees and costs against individuals — one of whom invested less than $10,000 — without any finding of any individual bad faith.

1. The Panel Had No Contractual Authority To Arbitrate Fees, and No Statute Authorized The Panel To Assess Attorneys' Fees Against The Investors.

The panel erroneously found that "the parties agreed to submit the issue of attorneys' fees and expenses to the Panel so that an enforceable 'bi-lateral agreement' exists." But "[a]rbitrators may award attorney fees only when the contract expressly *includes* an express authorization." *Matter of Prudential-Bache Securities*, 814 F. Supp. at 1084 (emphasis in original). These parties' arbitration agreements did not authorize fee shifting, explicitly or otherwise.

The panel apparently found a "bi-lateral agreement" in the parties' Joint Preliminary Statement and Scheduling Order. But in that pleading, the investors asked for their attorneys' fees on *statutory* grounds which allow recovery only to

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[2] The Eleventh Circuit has recognized that an arbitration award may be vacated if it is arbitrary and capricious. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410, 1412 (11th Cir. 1990).

prevailing claimants — and not to prevailing respondents — because of the type of claim. See the federal RICO statute, 18 U.S.C. § 1964(c); the Georgia RICO statute, O.C.G.A. § 16-14-6(c); the Georgia statute governing fraud or breach of fiduciary duty, O.C.G.A. § 51-12-7; and the Georgia Blue Sky laws, O.C.G.A. § 10-5-14(a). None of these statutes provide any basis for the panel's decision to award fees and costs to the respondents.

Both the investors and the respondents prayed for attorneys' fees and costs on grounds of bad faith. There was no other mutual agreement with regard to fees. To the extent the panel invoked authority to award fees on grounds other than bad faith, it exceeded its authority.

Arbitration panels should not be permitted to search beyond the submissions for bases to make awards. "[A]rbitrators are restricted to those issues submitted." *Totem Marine Tug & Barge v. North American Towing*, 607 F.2d 649 (5th Cir. 1979).

In this case, either the arbitration panel exceeded its authority by awarding fees where no contract or statute authorized such an award, or it arbitrarily and capriciously awarded fees on grounds of bad faith, despite no showing or finding of bad faith. Either result should be condemned by this Court.

2. The Panel Acted Arbitrarily And Capriciously By Awarding Fees Under The "Bad Faith" Exception.

The panel's award of substantial fees is baffling if it was meant to be premised on bad faith. (There was no finding of bad faith.) The chairman of the panel repeatedly acknowledged that the claims were not brought in bad faith. For example, when respondents' counsel feigned bewilderment about the

investors' claims, the chairman said: "Of course, I think (the investors) have been trying to set them forth since we began this thing. . . . I'm having difficulty understanding why you don't know what their claims are." Again speaking for the panel, the chairman confirmed that the claims were substantial and needed to be developed and considered carefully and thoroughly: "I think that there have been things that have developed along the way and have come out that need to be sifted through and need to be looked at by the arbitrators. . . . And unless my two cohorts up here overrule me, if it takes two more years to complete this case, then, you know, that's what we'll do."

The panel clearly understood the claims, understood that they were meritorious on their face, and encouraged their detailed presentation.

Thus the decision to award substantial fees is inexplicable. The panel's award, if construed as an award of "bad faith" attorneys' fees, was "a wholesale departure from the law," and thus arbitrary and capricious. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775 (11th Cir. 1993). Its "interpretation was . . . wholly unfounded." *Id.* There was "no ground for the Panel's decision." *Id.*

The appellate court's decision to affirm the award is contrary to well established authority regarding bad faith attorneys' fees. Bad faith attorneys' fees awards are rare, as a matter of public policy. Fees may be awarded only if claims are both without substance and brought for improper motive. *Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983); *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). Both elements of bad faith must be supported by clear and convincing evidence. *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

This Court should reject clearly any affirmation of an arbitration panel's award of bad faith attorneys' fees, when bad faith has neither been shown or found.

3. The Award Is Arbitrary And Capricious Because It Does Not Attribute Fees To Individual Conduct.

The arbitrators' decision to assess the entire amount of attorneys' fees and costs — nearly $650,000 — against each individual investor jointly and severally also conflicts with the rule that bad faith is personal, and may not automatically be attributed upon each investor. *Browning Debenture Holders Comm. v. DASA Corp.*, 560 F.2d at 1089 (2d Cir. 1977) (citation omitted) (one party's "procedural bad faith . . . may not automatically be visited upon the other [joint claimants] personally. Bad faith is personal. . . . [A]n award of . . . attorneys' fees based on bad faith must likewise be personal.")

Investors will not arbitrate disputes if there is the possibility that a joint and several award of substantial bad faith attorneys' fees may be entered against them, without explanation and without regard to their personal good faith. This is particularly clear in a situation like the one presented here, where one petitioner, who invested (and lost) about $10,000, now faces a personal judgment of nearly $650,000, even though there was absolutely no evidence whatsoever that he ever acted in bad faith. This is further true because the complaints in arbitration were joined for purposes of the hearing only, with the express agreement among all of the parties, including the respondents, that separate awards would be issued. Thus the panel ignored the parties' joint agreement regarding this issue. "'[A]rbitration agreements are, essentially, creatures of contract . . . .'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 383-84 (11th Cir. 1995) (citations omitted). "The Federal Arbitration Act 'requires

courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.'" *Western Employers Ins. Co. v. Jeffries & Co.*, 958 F.2d 258, 261 (9th Cir. 1992). This arbitration panel's decision conflicts with this basic principle.

B. The Arbitrators Engaged In Misconduct By Denying Postponement.

"[T]he arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown . . . ." 9 U.S.C. § 10(a)(3). Here, the arbitration panel refused to postpone the closing of petitioners' case despite the fact that petitioners' counsel of choice could not be present because of a conflict, a conflict created by a federal judge who wrote the panel and asked it to understand. Sufficient cause for postponement was shown.

The decision to pursue a claim through arbitration, rather than the court system, is a decision based in compromise. While some of the significant protections and formalities of the court system are not followed in arbitration proceedings, one significant and desirable advantage of arbitration is that it is flexible and accommodating. Affirming the decision of this arbitration panel to force the investors to close their case despite the unavoidable conflict of their lawyer will discourage claimants from arbitrating.

CONCLUSION

The issues posed here merit this Court's attention. Arbitration, with the encouragement of judges, has become a significant mechanism for resolving disputes in this country. But claimants will avoid arbitration if they know they will be compelled to proceed without the representation they chose, and if they can be charged with bad faith, and assessed substantial attorneys' fees and costs, regardless of their personal conduct and motives. This panel's arbitrary and capricious decision must not stand. The court decisions affirming the decision must also be reversed.

This 10th day of December, 1997.

Respectfully submitted,

WILLIAM E. SUMNER
Counsel of Record
SUMNER & ANDERSON
A Limited Liability Company
Suite 700, The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 588-9000

Attorneys for Petitioners

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NASD Arbitration Panel decision 25a

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

No. 96-8522.

MARSHALL & CO., INC., et al.,
Plaintiffs-Appellees,

v.

Paul A. DUKE, individually, and as Trustee for
Terri L. Strickland, et al.,
Defendants-Appellants.

June 10, 1997.

Following arbitration award by National Association of Securities Dealers (NASD) panel dismissing investors' claims and assessing attorney fees, broker and broker-dealer moved to confirm award, and investors moved to vacate award. The United States District Court for the Northern District of Georgia, No. 1:94-CV-3494-JEC, Julie E. Carnes, J., 941 F.Supp. 1207, confirmed award, and investors appealed. The Court of Appeals held that: (1) arbitrators had authority to award attorney fees to brokerage firm, and (2) award was not arbitrary or capricious.

Affirmed.

Appeal from the United States District Court
for the Northern District of Georgia.

Before BIRCH, Circuit Judge, RONEY, Senior Circuit Judge, and HANCOCK*, Senior District Judge.

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* Honorable James H. Hancock, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

This is an appeal from a district court judgment confirming an arbitration award entered under the National Association of Securities Dealers arbitration procedures. The arbitration panel denied all the claims of the appellants' securities customers against the appellees securities firms and individual brokers (''the brokers''), for alleged violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), the federal RICO statute, 18 U.S.C. § 1964, and their fiduciary duty under the Georgia law. The panel then awarded the brokers substantial attorney's fees and costs. The case came before the federal district court on the brokers' Petition to Confirm Arbitration Award and the securities customers' Motion to Vacate Arbitration Award.

The appellant securities customers asserted three grounds for vacating the award: (1) the arbitrators were guilty of misconduct within the meaning of 9 U.S.C. § 10(a)(3) by refusing to postpone a hearing and to hear certain evidence; (2) the arbitrators exceeded their powers within the meaning of 9 U.S.C. § 10(a)(4) in awarding attorney's fees in favor of the brokers; and (3) the arbitrators' award was arbitrary and capricious. In a comprehensive opinion, the district court denied the motion to vacate and confirmed the arbitration award. *Marshall & Co. v. Duke*, 941 F.Supp. 1207 (N.D.Ga.1995). On appeal, the securities customers raised many of the same issues raised before the district court. We affirm without revisiting all of these issues, as they were satisfactorily discussed in the district court's opinion. We do make these comments in view of the briefs and oral arguments made to this Court.

(1) As to the arguments concerning the failure to postpone a hearing and accept certain evidence, a careful review of the briefs and the district court decision reveals that this issue is due to be affirmed without opinion under this Cir-

cuit's Rule 36.1. That is the only issue raised as to the merits of the arbitrators' decision on liability.

(2) As to whether the issue of attorney's fees was arbitrable, we review the district court's decision under the standard for reviewing any judgment of a district court, "*i.e.* accepting findings of fact that are not 'clearly erroneous' but deciding questions of law *de novo*.". *First Options of Chicago v. Kaplan*, 514 U.S. 938, ____, 115 S.Ct. 1920, 1926, 131 L.Ed.2d 985, 996 (1995) (courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards).

The district court properly held it was within the power of the arbitrators to award attorney's fees in this case to the brokerage firm. In its Final Award, the panel based its decision on three different sources of power.

> First[,] the parties agreed to submit the issue of attorneys fees and expenses to the Panel so that an enforceable "bi-lateral agreement" exists. *See Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.)*, 753 F.Supp. 86 (S.D.N.Y.1990). Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American Rule." *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Dean Witter Reynolds, Inc. v. Bork*, 1991 WL 1644651, 991 U.S. Dist. LEXIS 11907 (E.D.Pa.1991). *See also* O.C.G.A. section 9-15-14.

Final Award at p.8.

The decision as to these three sources of power, that is, whether the attorney's fee issue is arbitrable, was due to be

reviewed independently by the district court, without the usual deference given to the award of an arbitrator. *First Options of Chicago v. Kaplan*, 514 U.S. at ____, 115 S.Ct. at 1925, 131 L.Ed.2d at 995. Although it was argued to us that the district court applied the wrong standard of review on these issues, it appears that the decision was properly made without any presumption of correctness being accorded the arbitrators' decision. The district court held that the panel could award attorney's fees under all three sources of authority.

Only one source of authority is necessary to affirm that decision. Since it appears clear that both parties sought an award of their fees without a jurisdictional objection from the other, the issue of who should get fees and how much was effectively submitted by agreement of the parties. In any event, the arbitrators have the power to award attorney's fees pursuant to the "bad faith" exception to the American Rule that each party bears its own attorney's fees.

(3) As to the propriety of the award, the district court may vacate an award of attorney's fees and the amount thereof issued by an arbitration panel under proper authority only if the award is arbitrary and capricious. *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir.1993). The record, reviewed under this standard, reveals that the district court correctly decided this question in favor of the award. This case was extensively litigated over a period of five years. The arbitration record fills 97 volumes. After the arbitration panel issued an interim order denying all of the securities customers' claims on the merits, it called for a separate round of briefing on the fee issue alone. We have read those briefs. The arbitration panel did not explicitly say the fee award was based on bad faith and submitted no findings in that regard. It is clear, however, that the decision was based on the claim of the broker appellees that they were entitled to fees based on the conduct of the claim-

ant parties. A recitation of the facts asserted in the appellees' brief that would support such an award would serve no useful purpose here. They are not reviewed under the "clearly erroneous" standard by the district court, but only to determine if the fee award was arbitrary and capricious. The district court did not clearly err in finding that the award was not arbitrary and capricious, and it applied the proper law in connection with its review.

It was argued that *First Options of Chicago* completely overruled everything that our Court held in *Robbins v. Day*, 954 F.2d 679 (11th Cir.), *cert. denied sub nom. Robbins v. PaineWebber, Inc.*, 506 U.S. 870, 113 S.Ct. 201, 121 L.Ed.2d 143 (1992). Even a superficial reading of *First Options* reveals the fallacy of this argument. That case decided but two things: *first*, when the issue is whether the parties have agreed to arbitrate a dispute, the district court reviews the arbitrators' decision on *that* issue for clear error as to factual findings and *de novo* as to questions of law. Otherwise, the more deferential standard of review generally accorded arbitrators' decisions on the merits applies, and *second*, a court of appeals reviews a district court's decision confirming an arbitration award as it would any other judgment of the district court, without according it the deference that the district court accords the arbitration merits decision. Although the district court cited *Robbins v. Day* frequently, it noted that the case had been overruled only on certain grounds, and did not rely on it for an incorrect standard of reviewing the arbitrability of the issues. Likewise, we have followed *First Options* on our review of the district court decision, and have noted that the district court followed only those holdings in *Robbins v. Day* left intact after the Supreme Court decision in *First Options*.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:94-cv-3494-JEC

MARSHALL & COMPANY, INC.; KENTWOOD BRETT THACKSTON; MARSHALL & COMPANY SECURITIES, INC.; and MICHAEL P. MARSHALL,

Plaintiffs,

vs.

PAUL A DUKE, individually, and as Trustee for Terri L. Strickland; JEAN F. DUKE; PAUL A. DUKE, JR.; C. HUNTER TISON; LAURA D. TISON; RUTH STRICKLAND; HERB STRICKLAND; JON A. PIRTLE; RONALD G. GREEN; and MATTHEW H. PATTON,

Defendants.

[stamp—FILED IN CHAMBERS, Luther D. Thomas, Clerk, By: L. Bates, Deputy Clerk]

ORDER

This case is presently before the Court on plaintiffs' Motion to Confirm Arbitration Award [1] and defendants' Motion to Vacate Arbitration Award [2]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that plaintiffs' motion should be granted and that defendants' motion should be denied.

BACKGROUND

Defendants brought claims against plaintiffs with the National Association of Securities Dealers ("NASD") in 1990 and 1991. Defendants' claims included alleged viola-

tions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and of the federal RICO statute, 18 U.S.C. § 1964. Defendants also stated claims for breach of fiduciary duty under Georgia law. These claims were consolidated for arbitration pursuant to arbitration agreements signed by each of the defendants and defendants' claims were heard by an NASD arbitration panel.[1] The arbitration panel consisted of two attorneys and a securities professional. After a substantial period of discovery, opening statements and testimony began on February 13, 1992.

Originally, defendants named Marshall & Co., Inc. ("Marshall & Co."), Wheat First Securities, Inc. ("Wheat")[2] and K. Brett Thackston as respondents in the underlying claims. Later, each respondent amended his or her Statement of Claim to add Marshall & Co. Securities, Inc. ("Marshall Securities") and Michael P. Marshall as respondents. Thackston was a stockbroker at Marshall Securities who had handled defendants' accounts. Marshall was the president and one of the managing directors of Marshall Securities during all times relevant to this litigation.

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[1] All defendants were represented by the same counsel during the arbitration and before this Court.

[2] At the time defendants brought the arbitration, Marshall Securities had ceased operating as a broker-dealer and had previously sold a portion of its assets to Wheat. In a related declaratory judgment action that arose out of this arbitration, defendants had argued that Wheat was liable as a successor-in-interest to Marshall Securities. *See Wheat First Sec. v. Green*, No. 1:90-CV-1077-ODE (N.D. Ga. filed Sept. 7, 1990). Ultimately, defendants' arguments in this regard were rejected and defendants' successor-in-interest claims were barred as a matter of law. *Id.* (Order of Mar. 17, 1992), *aff'd* 993 F.2d 814 (11th Cir. 1993). All of this collateral litigation took place while defendants' claims were pending before the arbitration panel and the panel stayed consideration of defendants' successor-in-interest claims pending resolution in the Court of Appeals. Thus, many of defendants' claims against Wheat were not considered by the arbitration panel.

Defendants pursued three basic theories of improper conduct in support of their claims,[3] all of which involved their investment in Central Corporation ("Central"), a Florida-based telecommunications company. They alleged that Marshall conspired with Atlanta businessman John D. Phillips to engineer a sham bankruptcy of Central in November of 1988 to the detriment of Marshall Securities' customers, including defendants. Defendants argued that Marshall's actions were motivated by a secret scheme to transfer defendants' equity interests to himself and his associates. Defendants further claimed that Thackston charged unlawful prices for Central stock and traded the same stock on behalf of himself and Marshall Securities in such a way as to create an undisclosed conflict of interest between himself and his customers, including defendants. Defendants specifically alleged that Thackston marked-up the price of the stock beyond the NASD's guidelines. Lastly, defendants claimed that Thackston misled them about Central's financial condition and that such misrepresentations prompted their repeated purchases of the stock from 1984-1989. Had Thackston been truthful, defendants assert, they would have sold their stock for a sizeable profit prior to the October of 1987 stock market crash.

Due in part to numerous adjournments, the arbitration proceedings continued until early 1994. The record indicates that defendants presented the testimony of nineteen witnesses in approximately fifty-eight sessions over a period of approximately two years. The arbitration record submitted to

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[3] The recitation of the nature of this litigation before the arbitration panel is of a summary nature and not intended to detail each and every allegation forwarded by defendants before the panel. Although some defendants stated additional claims, the main thrust of the arbitration may be summed-up by three basic theories.

the Court contains approximately six thousand pages of transcripts and exhibits. Plaintiffs contended that, notwithstanding the exhaustive nature of the proceedings, defendants failed to adduce any evidence to support their allegations and, thus, plaintiffs moved the arbitration panel for dismissal of defendants' claims on May 2, 1994.

After extensive briefing on the issues, the arbitration panel granted plaintiffs' motion in an interim order issued on August 9, 1994. In the August 9, 1994, order the arbitration panel indicated that it was considering the parties' submissions with respect to plaintiffs' (respondents' below) entitlement to attorneys' fees and requested further briefing from the parties before deciding. Subsequently, the parties filed lengthy memoranda regarding attorneys' fees and plaintiffs submitted evidentiary support for the amount of attorneys' fees and expenses they were seeking.

On December 23, 1994, the arbitration panel entered its Final Award. In its award, the panel restated its earlier dismissal of defendants' claims against plaintiffs and assessed $634,017.27 in attorneys' fees and expenses and $64,000 in forum charges against defendants. Following the panel's award, plaintiffs filed an application to confirm the ruling pursuant to Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9. In response to the petition, defendants filed a motion to vacate under § 10 of the FAA.

DISCUSSION

I. Introduction.

"Arbitration proceedings are summary in nature to effectuate the national policy of favoring arbitration, and they require 'expeditious and summary hearing, with only restricted inquiry into factual issues.' " *O.R. Sec., Inc. v. Professional Planning Assocs.*, 857 F.2d 742, 747-48 (11th Cir. 1988) (quoting *Legion Ins. Co. v. Insurance Gen.*

Agency, Inc., 822 F.2d 541, 543 (5th Cir. 1987) and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). This Court's disposition with respect to defendants' Motion to Vacate is a summary procedure that is properly decided on the papers submitted by the parties and the party seeding vacatur bears the burden of setting forth sufficient grounds to vacate the award in his moving papers at the outset. *Id.* at 746 n. 3, 748; FED. R. CIV. P. 78. "Accordingly, the Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards and that the courts' review of the arbitration process will be severely limited." *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *overruled in part on other grounds, First Options of Chicago, Inc. v. Kaplan*, 115 S. Ct. 1920, 1926 (1995).

Section 10 of the FAA specifies the following grounds for vacating an arbitration award:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). "The statute does not allow courts to 'roam unbridled' in their oversight of arbitration awards, but carefully limits judicial intervention to instances where the arbitration has been tainted in specified ways." *Robbins,*

954 F.2d at 683 (citations omitted). "Accordingly, parties may not seek a 'second bite at the apple' simply because they desire a different outcome." *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994).

Defendants have asserted three grounds upon which the Court should vacate the panel's award in this case. Defendants assert that the arbitration panel is guilty of misconduct for refusing to grant any more adjournments in April of 1994 and for cutting off the presentation of plaintiffs' live testimonial evidence at that time. 9 U.S.C. § 10(a)(3). Defendants further assert that the panel exceeded its powers in the part of the Final Award in which attorneys' fees were awarded to plaintiffs. 9 U.S.C. § 10(a)(4). Lastly, defendants assert that the award is "arbitrary and capricious" on its face and, thus, should be vacated pursuant to the judicially created "arbitrary and capricious" ground for vacatur. *See Robbins,* 954 F.2d at 683. Upon complete review of the arguments by the parties, the Court concludes that none of defendants' arguments provide a basis upon which the arbitration award may be vacated. Accordingly, the Court concludes that plaintiffs' Motion to Confirm should be granted and that defendants' Motion to Vacate should be denied.

II. Guilt of Misconduct by the Panel.

Pursuant to the FAA, a reviewing court may vacate an arbitration award if "the arbitrators were guilty of misconduct in refusing to postpone the hearing, . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). This statutory basis for vacatur does not, however, invite hindsight evaluations of the correctness of the judgment of an arbitration panel in managing the presentation of evidence during an arbitration. "An arbitrator enjoys wide latitude in conduct-

ing an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence." *Robbins,* 954 F.2d at 685. Moreover, an "arbitrator is not bound to hear all the evidence tendered by the parties; he need only give each party the opportunity to present its arguments and evidence." *Id.* (citation omitted).

As the Court reads § 10(a)(3) of the FAA, there are three general subcategories of arbitration panel misconduct that would justify vacatur: (1) misconduct in refusing to postpone the hearing(s); (2) misconduct in refusing to hear material evidence; or (3) any other "misbehavior" that prejudices any party's rights. Although it is not entirely clear from defendants' pleadings, they appear to argue that both the first and second bases for vacatur under § 10(a)(3) exist in this case. The Court notes, however, that it is arbitrator *misconduct* or *misbehavior* that warrants vacatur, not a difference of opinion with respect to the ideal resolution of procedural issues that arose during the course of an arbitration. Rather than direct the Court's attention to specific indicia of misconduct, defendants' arguments in support of vacatur invite the Court to conduct a searching review of the arbitration record and, in effect, second-guess the panel's judgments with respect to the scheduling of hearings and the presentation of evidence.

Upon review of the record and the arguments of the parties, the Court can discern no arbitrator misconduct that would warrant vacatur. Moreover, as plaintiffs' have ably argued, defendants have failed to demonstrate any prejudice from any actions taken by the panel with respect to refusing to grant any further adjournments in April of 1994. Plaintiffs have not directed the Court's attention to any evidence they would have adduced but for the refusal to continue the proceedings any further at that time.

With respect to the panel's refusal to continue the proceedings beyond April of 1994, "[t]he issue comes down to the question whether there was any reasonable basis for the arbitrators to refuse to postpone the hearing or to continue it in order to receive [additional witness] testimony."[4] *Schmidt v. Finberg*, 942 F.2d 1571, 1574 (11th Cir. 1991). Defendants argue that the panel's decision was harsh, unfair and based upon the panel's erroneous perception that defendants were attempting to unduly delay the proceedings. Defendants' own argument contains a reasonable basis upon which the panel could have denied a continuance and, thus, is fatal to their claim of misconduct in refusing an adjournment.

Defendants' own argument concedes that the panel had adopted plaintiffs' position that defendants had unduly delayed the proceedings and simply refused to tolerate any further delay. In essence, defendants invite the Court to review each and every delay during the course of an arbitration that lasted a total of five years and assess how much delay is attributable to plaintiffs, defendants and the panel itself. Then, defendants invite the Court to weigh in on the accuracy of the panel's perceptions on the issue of who was to blame for the extremely lengthy arbitration proceedings in this case. Although the Court declines to accept defendants' invitation, it does note that defendants repeatedly failed to meet their obligations with respect to hearings scheduled during late 1993 and early 1994. In fact, defendants had effectively sought an adjournment for the entire first half of 1994, after having failed to comply with the schedule they had agreed to for late 1993. Defendants apparently believe

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[4] Plaintiffs have directed the Court's attention to evidence tending to indicate that defendants had only one additional witness to present at the time the panel refused any further continuance in the proceedings. According to this evidence, this testimony was estimated at approximately 1/2 of a day. Defendants have not disputed plaintiffs' assertions in this regard.

that the panel was obligated to grant unlimited adjournments due to defendants' counsel's scheduling conflicts.[5]

"Finally, the panel may have decided that the proceeding had already been protracted so long as to violate the policy of expeditious handling of such disputes." *Id.* At the time the panel refused defendants' request for adjournment in April of 1994, the arbitration had been ongoing for approximately four years and the panel had heard testimony over a period of two years. Additionally, the arbitration record in this case is voluminous and contains literally thousands of pages of testimony and exhibits. Defendants apparently wished to present the testimony of one more witness at the time the panel declined any further continuance. Given the lengthy proceedings and the voluminous record in this case, the panel may very well have determined that enough was enough. Based on this record, defendants cannot seriously argue that the panel's refusal to grant another adjournment effectively prevented them from being heard. Accordingly, the Court concludes that the panel's refusal to grant further adjournments in April of 1994 does not provide a reason to vacate the panel's award.

Defendants further argue that the panel was guilty of misconduct due to its refusal to hear more testimonial evidence when it cut off the hearings before defendants had

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[5] In this regard, the Court notes that it was not the unavailability of witnesses that was fueling defendants' repeated requests for adjournments in 1993 and 1994. Rather, it was conflicts with the schedule of defendants' primary counsel, Mr. Sumner, that kept getting in the way. As plaintiffs have pointed out, other attorneys within Mr. Sumner's firm had been involved, to some degree, in this litigation. Based upon the numerous delays caused by Mr. Sumner's repeated and lengthy adjournment requests, the panel may very well have thought it was time for other attorneys in Mr. Sumner's firm to become more involved in the case in order to reduce the likelihood of further delay.

presented their last witness.[6] Defendants arguments in this regard fail. "A federal court may vacate an arbitrator's award under 9 U.S.C. § 10(a)(3) only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing." *Robbins,* 954 F.2d at 685. Arbitrators have wide latitude in conducting arbitration hearings and are not required to hear any and all evidence tendered by the parties. *Id.* "Thus, the [FAA] allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues." *Id.*

As noted previously, defendants have failed to direct the Courts attention to any specific evidence they were prevented from presenting and have failed to demonstrate any prejudice arising from such a lack of evidence. Also as noted previously, defendants cannot seriously argue that they did not receive a fair opportunity to present their arguments and evidence. Additionally, as noted by plaintiffs, the panel invited and received extensive briefing from the parties with respect to its determination of plaintiffs' Motion to Dismiss all of defendants' claims after it cut off further hearings. Such an invitation provided all the parties with an opportunity to supplement the existing voluminous record with any additional argument or citation to evidence the parties felt was necessary. Accordingly, the Court concludes that defendants' Motion to Vacate should be denied to the extent defendants rely upon § 10(a)(3) of the FAA.

III. Lack of Power to Award Attorneys' Fees.

Defendants assert that the portion of the Final Award granting attorneys' fees and expenses to plaintiffs should be

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[6] Defendant Paul A. Duke, Jr. further asserts that he was unable to present his evidence regarding his individual "churning" claims against plaintiffs and Wheat.

vacated because the panel lacked the power to award such relief. Defendants rely upon § 10 of the FAA, which provides for vacatur "[w]here the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). In rendering its Final Award, the panel based its award on three different sources of power.

> First[,] the parties agreed to submit the issue of attorneys fees and expenses to the Panel so that an enforceable "bi-lateral agreement" exists. *See Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.),* 753 F. Supp. 86 (S.D.N.Y. 1990). Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American Rule". *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975); *Dean Witter Reynolds, Inc. v. Bork,* 1991 U.S. Dis. LEXIS 11907 (E.D. Pa. 1991). *See also* O.C.G.A. Section 9-15-14.

(Final Award at p. 8.)

Defendants argue that the first two cited bases of power do not exist and that the factual record in this case does not support an award of attorneys' fees under the third source. Defendants further argue that the panel's possible reliance upon either of the first two cited bases of power subjects any award of attorneys' fees to vacatur. Plaintiffs argue that the panel's recitation of sources of power was proper and that the panel in fact enjoyed the benefits of such sources of power. Upon complete review of the record and the arguments of the parties, the Court concludes that the panel's reliance upon the listed sources of power was proper.

"In light of the federal policy favoring arbitration at work here, [the Court's] task is to resolve all doubt in favor of the arbitrator's authority to award a particular remedy." *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 776 F.2d 269, 270 (11th Cir. 1985) (*citing Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)). This approach is fully consistent with the presumption of correctness afforded arbitration awards and the summary nature of court confirmation of such awards. In fact, the § 10(a)(4) prohibition against arbitrators' exceeding their powers "is to be accorded the 'narrowest of readings.' " *Blue Tee Corp. v. Koehring Co.*, 999 F.2d 633, 636 (2d Cir. 1993) (*quoting Andros Campania Maritima, S.A. v. Marc Rich & Co. A.G.*, 579 F.2d 691, 703 (2d Cir. 1978)). The Court will address each of the panel's asserted sources of power to award attorneys' fees in this case.

At the outset, the Court notes that defendants concede that arbitrators have the power to award attorneys' fees pursuant to the "bad faith" exception to the American Rule.[7] (Defs.' Reply Br. in Supp. of Mot. to Vacate at p. 20.) Rather than contest this source of power, defendants assert that any award pursuant to the bad faith exception would be arbitrary and capricious under the facts of this case. Defendants further assert that the panel's failure to apportion the attorneys' fees awarded among the various defendants was, in itself,

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[7] Plaintiffs' argue vigorously that this one concession ends the Court's inquiry with respect to defendants' § 10(a)(4) challenge to the panel's Final Award. Plaintiffs contend that either the panel had the power or it did not. Having conceded at least one source of power, as defendants have done, plaintiffs argue that defendants' challenge to the other two recited bases of power is irrelevant. Although the Court is persuaded by the argument, it need not reach the issue, as it concludes that any and all of the recited bases of power were proper.

arbitrary and capricious. Each of these arguments will be addressed separately in the Court's discussion of the defendants' arbitrary and capricious arguments.

In challenging the other two sources of power recited by the panel, defendants assert that such a recitation necessarily implies that the panel granted attorneys' fees to plaintiff for an improper purpose. Defendants argue that the panels' recitation of the various sources of power available to the panel gives rise to an inference that the panel awarded attorneys' fees and expenses to plaintiffs merely because plaintiffs prevailed on the merits of the underlying arbitration. As defendants' theory goes, they sought attorneys' fees in their claims below pursuant to statutory authority allowing for prevailing claimants to receive such fees and expenses. Plaintiffs, on the other hand, sought attorneys' fees pursuant to the bad faith exception to the American Rule. Thus, defendants argue that the panel's Final Award indicates that the panel was somehow confused and may have awarded fees to plaintiffs without having concluded that the bad faith exception applied to defendants' claims.

The Court is at a loss with regard to defendants' arguments in this regard. Defendants themselves indicate that plaintiffs sought attorneys' fees from the panel based upon their assertion that defendants claims were frivolous and defendants had conducted the underlying litigation in bad faith and for improper purposes. Once the panel issued its interim order denying all of defendants' claims on the merits, it then sought further briefing from the parties with respect to plaintiffs' bad faith claim for attorneys' fees. The only issue before the panel at that point of the litigation, was whether plaintiffs' were entitled to their attorneys' fees *on the ground that such fees and expenses had been sought* in plaintiffs' counterclaims against defendants.

Rather than giving rise to an inference of confusion on the panel's part, the course of the arbitration makes it clear that the panel's consideration of plaintiffs' fee request was based upon the only ground plaintiffs had sought such fees. The panel requested a separate round of briefing on the fee issue *after* it had found for plaintiffs on the liability issues. The parties then responded by providing extensive briefing to the panel on the fee issue alone. Thus, the panel's consideration of the fee request was conducted in isolation and with the knowledge that plaintiffs had prevailed on the merits and with its own assessment of defendants' conduct of the litigation. The panel could not have made itself any clearer.

Contrary to defendants' assertions, the issue of attorneys' fees was properly before the panel. Prior to the arbitration, the parties had agreed to submit all disputes between them to arbitration. The uniform submission agreement executed by all parties expressly provides that the panel has the power to decide the controversy before it "as set forth in the attached statement of claims, answers, and all related counterclaims . . . asserted." Defendants do not dispute that plaintiffs counterclaim submitted to the panel contained a claim for bad faith attorneys' fees against defendants. Moreover, *The Arbitrator's Manual,* which provides guidance for NASD arbitrators' decisions, provides that a panel may award fees in "an exceptional case." Defendants concede that this express grant of authority would provide a source of power upon which the panel could award bad faith attorneys' fees.[8] Accordingly, the Court concludes that the

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[8] Defendants appear to argue that the exceptional circumstance language in the manual and the bad faith exception are coextensive and, thus, this purported base of power is somehow redundant. As this argument goes, defendants assert that the panel could not rely upon the submission agreement and the NASD rules of arbitration as an independ-

panel's recitation of the NASD rules and the submission agreements as sources of power was not in error.

Moreover, both plaintiffs and defendants had affirmatively sought an award of attorneys' fees from the panel. Each side had made its claim pursuant to the proper bases for such awards to each side. Plaintiffs argue that, notwithstanding any other available source of power, such voluntary submissions indicate agreement by the parties to submit the issues to the panel for decision. *See Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 809 (2d Cir. 1960); *Reyes Compania Naviera S.A. v. Manumante S.A.*, 649 F. Supp. 789, 792 (S.D.N.Y. 1986). The parties *mutual* agreement to have any and all fee issues decided by the panel is evidenced by their joint submission of the issues to the panel.[9] Having agreed to have the fees issue decided by the panel, the parties will not

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ent source of power because the panel could only award fees upon a proper finding of bad faith. The Court fails to comprehend the import of this argument. Defendants expressly concede that the panel had the power to award bad faith attorneys' fees pursuant to the NASD rules and, as discussed above, it appears that this is precisely what the panel did. Accordingly, the Court need not decide whether the NASD's "exceptional circumstances" rule and the "bad faith" exception to the American Rule are coextensive as a matter of law, as all the parties agree that bad faith litigation would fall within the "exceptional circumstances" upon which fees could be awarded.

[9] Defendants argue, without any citation, that the attorneys' fees issues did not constitute a "joint" submission because the parties were seeking an award based upon different legal theories. The Court is not persuaded by this argument. The fact of the matter is that both parties sought fees. As defendants have noted, the only means for plaintiffs to have sought such fees was upon a finding of bad faith by defendants. Thus, is it not surprising that plaintiffs did not seek fees on the same statutory grounds that defendants' fees claims were based upon.

now be heard to object that the panel lacked the power to decide the issues submitted. Accordingly, for all of the foregoing reasons, the Court concludes that the panel possessed the power to award attorneys' fees to plaintiffs in this case and that defendants' Motion to Vacate should be denied to the extent such motion is based upon 9 U.S.C. § 10(a)(4).

IV. Arbitrary and Capricious Award?

In addition to the statutory grounds for vacatur, the Eleventh Circuit has also recognized an additional ground for awards that are "arbitrary and capricious", as the term has been rather narrowly construed. *Robbins,* 954 F.2d at 683; *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 903 F.2d 1410, 1411-12 (11th Cir. 1990). In explaining when an award is "arbitrary and capricious", the Eleventh Circuit has stated that an award is such "only if 'a ground for the arbitrator's decision can[not] be inferred from the facts of the case.' " *Raiford,* 903 F.2d at 1413 (citations omitted). Such a limited definition is consistent with the presumption of correctness afforded arbitral awards. "Only after it is determined that there could be no proper basis for the award, should a court consider looking beyond the [FAA] to determine the applicability of court made standards for the vacatur of an arbitration award." *Robbins,* 954 F.2d at 684.

Defendants challenge the attorneys' fees award in this case as arbitrary and capricious on two separate grounds. First, defendants assert that, on the facts of this case, such an award is without any rational basis in law or fact. Additionally, defendants assert that the panel's failure to apportion the fees among the various defendants indicates that the award is arbitrary and capricious. For the reasons stated below, the Court cannot conclude that the panel's award was arbitrary and capricious.

The course of this arbitration indicates that the defendants made a number of claims involving allegations of grossly improper conduct on the part of the plaintiffs. The claims involved alleged conspiracies, fraud, abuse of federal judicial process in the form of the filing and confirmation of a "sham" bankruptcy and a host of alleged conduct in violation of the federal securities laws. Defendant then proceeded to present voluminous testimonial and exhibit evidence in support of these claims of wildly unlawful conduct by the plaintiffs. As the proceedings dragged on, defendants repeatedly sought to gain a favorable settlement from plaintiffs but plaintiffs stood fast in their denials of any wrongdoing. Ultimately, as defendants' case was winding down in the arbitration, plaintiffs indicated that they wished to file a motion to dismiss all of defendants claims.[10] The panel then indicated that it was receptive to such a motion.

The parties filed lengthy and detailed memoranda in support and in opposition to plaintiffs' Motion to Dismiss defendants' claims. After considering these briefs and the evidence in the case, the panel concluded that defendants had failed to adduce any evidence in support of any of their claims. Based on the lengthy discovery and extensive hearings in this case, it appears that the panel ultimately agreed with plaintiffs' theory of defendants' motivations for bringing this litigation in the first instance: that theory being that defendants' claims were frivolous from the outset and motivated by nothing more than a desire to coerce a favorable settlement out of plaintiffs.

As with their other arguments, defendants invite the Court to conduct a *de novo* review of the voluminous arbitration record to determine whether, in this Court's judgment,

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[10] Such a motion is similar to a motion made in federal court pursuant to FED. R. CIV. P. 52(c). The moving party seeks judgment at the close of the claimants' case.

defendants presented colorable claims sufficient to escape an award of attorneys' fees. Defendants cite various arguably favorable comments made by members of the panel at various points in the transcript, as well as their own allegations from the original claims, then assert that an award of attorneys' fees against them must be arbitrary and capricious. Defendants' arguments in this regard ignore the course of this arbitration.

After lengthy discovery and numerous proceedings, the panel concluded that defendants had failed to present any evidence to support their numerous claims of serious misconduct. The panel observed the course of the proceedings, heard all the evidence and read the extensive briefing by the parties on the fees and expenses issue. Now defendants invite the Court to review all of this same matter and then substitute its own judgment for the judgment of the panel. Contrary to defendants' arguments, the Court is not permitted to "roam unbridled" through the record in its oversight of the arbitration process. *Robbins,* 954 F.2d at 683.

Although it is never expressly stated, defendants appear to imply that the panel's failure to explain its award in detail gives rise to an inference that the award itself is improper. Defendants have avoided making this argument more directly for good reason. It is well established that " 'the absence of express reasoning by the arbitrators [does not] support the conclusion that they disregarded the law.' " *O.R. Sec.,* 857 F.2d at 747 (*quoting Stroh Container Co. v. Delphi Indus., Inc.,* 783 F.2d 743, 750 (8th Cir. 1986)).[11] Thus, to the

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[11] The quoted authority discusses the judicially created "manifest disregard for the law" ground for vacatur that has been adopted by a number of circuit courts. Although the Eleventh Circuit has never expressly adopted the "manifest disregard for the law" basis for vacating an arbitration award, *O.R. Sec.,* 857 F.2d at 747, more recent precedent

extent that the panel awarded attorneys' fees and expenses against all defendants without apportioning the amount of fees owed by each defendant, such a lump sum award does not, in and of itself, give rise to the conclusion that the award was arbitrary and capricious.

The panel concluded that each and every defendant had failed to adduce any evidence in support of any of their claims. The panel appears to have concluded, as had been suggested to it by plaintiffs, that the defendants were joint venturers in what the panel concluded was frivolous, bad faith litigation that had been pursued for an improper purpose from the start. The Court will not now second-guess the judgment of the panel under the guise of a determination that the panel's action was "arbitrary and capricious". Accordingly, the Court concludes that defendants' Motion to Vacate should be denied in its entirety.

CONCLUSION

For the foregoing reasons, petitioners' Motion to Confirm Arbitration Award [1] is GRANTED and Respondents' Motion to Vacate Arbitration Award [2] is DENIED. It is further ordered that the Clerk's office is directed to terminate this action.

SO ORDERED, this 26th day of July, 1995.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

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has blurred any distinction that may have existed between that ground and the "arbitrary and capricious" ground. See *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993) (holding that a court "may vacate an award as arbitrary and capricious when the award *exhibits a wholesale departure from the law.*" (emphasis added)). Accordingly, the citation to *O.R. Sec.'s* discussion of the manifest disregard for the law standard appears apt.

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Among

Name of Claimants

Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland, Ronald G. Green and Matthew H. Patton

Consolidated Case Numbers [1]
90-00460 90-00461 91-00116

Name of Respondents

Marshall & Co., Inc.; Marshall & Co., Securities, Inc.; Wheat First Securities, Inc.., successor in interest to Marshall & Company, Inc. and to Marshall & Co. Securities, Inc.; Kentwood Brett Thackston, and Michael P. Marshall

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REPRESENTATION

For Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland, Ronald G. Green and Matthew H. Patton (hereinafter referred to collectively as "Claimants"); William E. Sumner, Esq. of the law firm of Sumner & Hewes, Atlanta, Georgia. Claimants were also represented by Nancy Becker Hewes, Esq., Stephen Anderson, Esq. and A. Thomas Stubbs, Esq. of the law firm of Sumner & Hewes, Atlanta, Georgia.

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[1] Based upon the consent of all parties, Case Numbers 90-00460, 90-00461 and 91-00116 were consolidated.

For Respondents Marshall & Co., Inc.; Marshall & Co. Securities, Inc.; Wheat First Securities, Inc., successor in interest to Marshall & Company, Inc. and to Marshall & Co. Securities, Inc.; Kentwood Brett Thackston, and Michael P. Marshall (hereinafter collectively referred to as "Respondents"); Peter W. Schneider, Esq. of the law firm of Rogers & Hardin, Atlanta Georgia

CASE INFORMATION

Statement of Claim filed by Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland in Arbitration Case Number 90-00460 on: February 13, 1990

Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland Submission Agreement signed on: February 5, 1990

Amended Statement of Claim filed by Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland in Arbitration Case Number 90-00460 on March 15, 1991

Respondents Marshall & Co., Inc. ("Marshall") and Kentwood Brett Trackston ("Thackston") filed a Joint Statement of Answer and Counterclaim to case number 90-00460 on: May 4, 1990

Respondents Marshall and Thackston did not execute a Uniform Submission Agreement. (See Other Issues Considered and Decided)

Respondent Wheat First Securities, Inc. n/k/a Wheat First Butcher Singer, Inc. ("Wheat First") filed Statement of

Answer and Counterclaim to case number 90-00460 on: May 4, 1990

Wheat First did not execute a Uniform Submission Agreement. (See Other Issues Considered and Decided).

Answer, Affirmative Defenses and Counterclaim of Marshall, Marshall & Co., Securities, Inc. (''MCS'') and Thackston to the Amended Statement of Claim filed in case Number 90-00460 on April 29, 1991

Amendment to Answer filed by Respondents Marshall, MCS, and Michael P. Marshall (''Mr. Marshall'') on consolidated case Numbers 90-00460 and 90-00461 on November 22, 1991.

Statement of Claim filed by Claimant Ronald Green (''Green'') which was assigned Case No. 90-00461 was filed on: February 13, 1990

An Amended Statement of Claim was filed by Green on March 15, 1991

Claimant Green's Submission Agreement was signed on January 26, 1990.

Respondents Marshall and Thackstons' Joint Answer and Counterclaim filed in Case Number 90-00461 on May 4, 1990.

Respondent Wheat First Answer and Counterclaim filed in Case Number 90-00461 on May 4, 1990

Respondent Wheat First Answer to the Amended Statement of Claim filed in Case Number 90-00461 on April 29, 1991

Respondent Michael P. Marshall (''Mr. Marshall'') Answer and Counterclaim filed in Case Number 90-00461 on April 29, 1991

Claimant Matthew H. Patton (''Patton'') Statement of Claim filed in Case Number 91-00116 on January 7, 1991

Patton's Submission Agreement signed on January 3, 1991

Patton's Amended Statement of Claim filed November 4, 1991

Wheat First's Statement of Answer filed in Case Number 91-00116 on February 27, 1991

Wheat First's Statement of Answer to Patton's Amended Statement of Claim filed in Case Number 91-00116 on December 3, 1991

Marshall and Thackstons' Joint Statement of Answer filed in Case Number 91-00116 on February 27, 1991

Marshall, MCS and Thackstons' Answer and Counterclaim to Patton's Amended Statement of Claim filed in Case Number 91-00116 on December 3, 1991

Marshall, MCS and Thackston to Answer and Counterclaim to Patton's Amended Statement of Claim filed in Consolidated Case Numbers 90-00460, 90-00461 and 91-00116 on December 3, 1991

Claimants' Response to Respondents' Counterclaims in Case Numbers 90-00460, 90-00461 and 91-00116 filed on July 26, 1991

Amended Counterclaim of Respondents filed in Case Numbers 90-00460, 90-0461 and 91-00116 on February 24, 1992

HEARING INFORMATION

Pre-Hearing Conference: December 17, 1991 - two sessions
February 22, 1994 - one session

Hearing Dates/Sessions: January 21, 1992 - two sessions
(preliminary hearing before entire panel)
February 13, 1992 - two sessions
February 14, 1992 - two sessions

March 23, 1992	- two sessions
May 4, 1992	- two sessions
May 5, 1992	- two sessions
June 12, 1992	- two sessions
July 23, 1992	- two sessions
July 24, 1992	- two sessions
August 13, 1992	- two sessions
August 26, 1992	- two sessions
August 27, 1992	- two sessions
September 30, 1992	- two sessions
October 1, 1992	- two sessions
October 2, 1992	- two sessions
December 16, 1992	- two sessions
December 17, 1992	- two sessions
December 18, 1992	- two sessions
February 25, 1993	- one session
April 12, 1993	- one session
April 13, 1993	- two sessions
April 14, 1993	- two sessions
April 21, 1993	- two sessions
April 22, 1993	- two sessions
April 23, 1993	- one session
August 23, 1993	- two sessions
August 24, 1993	- two sessions
September 8, 1993	- two sessions
September 28, 1993	- two sessions
September 29, 1993	- two sessions
November 11, 1993	- two sessions
November 12, 1993	- one session
December 7, 1993	- two sessions
April 14, 1994	- two sessions

Hearing Locations: NASD District Office, and Atlanta Hilton Hotel - Atlanta, Georgia

CASE SUMMARY

Claimants alleged, among other things, that Respondents breached there obligations that they owed to Claimants. Claimants alleged that Respondents made repeated material misrepresentations to Claimants regarding Central Corporation (''Central'')[2] and its predecessor companies and that Respondents repeatedly failed to disclose material adverse information. Claimants alleged that Respondents Marshall, Mr. Marshall and Thackston demonstrated preferential treatment toward Marshall and Mr. Marshall and other related investors and entities to the detriment of the Claimants. Claimants allege that Thackston continually touted Central and continually persuaded Claimants to take larger and larger positions in Central. Claimants alleged that Thackston discouraged them from selling Central and that Thackston assured Claimants that if Central had any significant problems he and other representatives of Marshall would know and that Thackston would relay the information to Claimants immediately. Claimants alleged that they relied exclusively on the advice of Respondents as to their Stock transactions in Central. Claimants alleged that either Marshall, Mr. Marshall or Thackston knew and concealed Central's serious problems or they knew about these problems and lied to Claimants. Claimants alleged that Thackston continually lied to them so that they would keep purchasing Central and to prevent them from selling Central. Claimants alleged that they were defrauded by the affirmative misrepresentations of

[2] Central Stock went through several name changes during the relevant period. During the Claimants initial purchase period it was named 21st Century Robotics and in late 1985 it merged with Sun Teleservices Corporation to form TFC Teleservices Corporation. In March of 1987, the company changed its name to Central Corporation. In November 1988, Central filed in bankruptcy under Chapter 11 and later emerged form Chapter 11 proceedings with a new name Resurgens Communications Group, Inc. (''Resurgens'').

Thackston and Marshall. Claimants alleged that had fraudulent misrepresentations not been made, they could have protected themselves by selling their Central stock. Claimants alleged that Thackston personally guaranteed that Central stock would go up. Claimants alleged that Respondents breached their fiduciary duty they owed Claimants. Claimant Paul Duke alleged that Respondents churned his account and made unauthorized trades in his account. Claimants alleged that Thackston, Marshall and its successor in interest Wheat First made improper margin calls in respect to Duke, Jr.'s account. Patton alleged that Thackston, based on material misrepresentations, induced Patton to purchase shares of Resurgens. Patton alleged that Respondents made unauthorized trades in his account and that Marshall and its agents, induced him into investing in investments which were unsuitable given Patton's investment goals. Claimants alleged market manipulation, violation of NASD rules and deception by Thackston's selling Central through house accounts which took place outside of the parameters of the bid and ask. Claimants asserted that Mr. Marshall and others conspired to force Central through a pre-arranged bankruptcy reorganization. Claimants alleged securities fraud, common law fraud, breach of fiduciary duty, negligence, violation of Federal Racketeer Influenced and Corrupt Organization Act, violation of Section 16-14-3 of the Georgia Racketeer Influenced and Corrupt Organization Act, and unjust enrichment.

Respondents denied the allegations asserted by Claimants in all respects. Respondents maintained, among other things, that they had a reasonable basis for all statements and opinions that they provided Claimants. Respondents maintained that virtually all of Claimants' trades in Central were based on the advice that they received from the manager of their securities portfolio, Claimant Ruth Strickland. Respondents maintained that it was Ms. Strickland and Claimants, not Respondents, who made the decision to invest in Central.

Respondents maintained that Ms. Strickland had known about Central since 1984 and that she conducted an independent research of Central, which verified Marshall's and Thackston's opinion about the stock. Respondents maintained that it was Claimants not Respondents who exercised control over Claimants accounts. Respondents maintained that although Thackston provided Claimants with investment advice they exercised their independent decision at to whether to purchase or sell Central. Respondents maintained that the Claimants', whose claims have been consolidated for hearing in this matter, are wealthy, sophisticated investors with broad business and market experience. Claimants were well aware of all the risks associated with Central and decided when to buy and when to sell Central stock. The Claimants have attempted to shift their responsibility to Respondents by using the benefit of hindsight. Respondents maintained that all material information was properly disclosed to Claimants and that Claimants purchased some Central in a May, 1987 private placement in which the Private Placement Memorandum disclosed the particularized risks of investing in Central. Respondents denied that they have committed any violations of federal securities laws, the laws of the state of Georgia or the rules of the NASD, Inc. Respondents set forth the following affirmative defenses in the pleadings filed in this consolidated matter: Claimants' claims are barred by the doctrine of estoppel and ratification; Claimants failed to exercise the degree of diligence required of investors; Respondents' acted properly and in good faith; Claimants suffered no damages as a result of Respondents actions; Claimants' negligence claim is barred by the defense of contributory negligence; Respondents, as a matter of law, are not liable to Claimants for any alleged violation of NASD rules; and, Claimants' claims are barred by the applicable statues of limitation.

Respondents asserted a counterclaim against Claimants for attorneys' fees and expenses that have been incurred by reason of the need to defend Claimants' claims.

Respondent Wheat First maintained that Claimants assert no valid claim against it and that all claims about trading arise out of purchases and sales of Central at Respondent Marshall & Co., Inc. Wheat First maintained that Claimants assertion that Wheat First is liable as a "successor in interest" to Marshall is without merit. Wheat First maintained that under the terms of the Asset Purchase Agreement, Wheat First has no liability for the claims raised in this matter. Respondent Wheat First counterclaimed for attorneys' fees and expenses incurred by reason of the need to defend this claim.

In Respondents Amended Counterclaim, Respondents more specifically delineated the basis for their counterclaim and alleged among other things that Claimants claims were without justification and were asserted in bad faith to harass Respondents. Respondents further asserted that Claimants through a series of actions tried to pressure Respondents to accede to Claimants unreasonable settlement offer.

Claimants' denied each and every allegation of wrongdoing and liability set forth by the Respondents in their counterclaims.

RELIEF REQUESTED

Claimants Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, trustee for Terri L. Strickland, in their pleadings, requested reimbursement for their losses in an amount not less than $2,153,700.00, with interest thereon at a rate of 12%; attorneys' fees incurred in connection with this dispute; the costs

and expenses incurred and punitive damages in an amount determined by the arbitrators.

Claimant Green requested an amount not less than $1,500,000.00, plus interest thereon at 12%; attorneys' fees incurred in connection with this dispute; costs and related expenses and punitive damages in an amount determined by the arbitrators.

Claimant Patton requested an amount of not less than $900,000.00, plus interest thereon at 12%; attorneys' fees incurred in connection with this dispute; costs and related expenses related to this arbitration; and punitive damages as determined by the arbitrators.

The Claimants also requested damages under RICO.

Respondents requested that Claimants' claims be dismissed in their entirety and that they be awarded attorneys' fees and expenses.

Respondents Wheat First, MCS and Mr. Marshall requested that the arbitrators dismiss them from these proceedings prior to the hearings.

Respondents Wheat First, MCS, Marshall and Mr. Marshall in their Memorandum of Law in support of their application for an award of attorneys' fees and expenses requested legal fees in the amount of $543,747.50 and out of pocket expenses in the amount of $90,269.77 for a total of $634,017.27.

Claimants requested that Respondents request for fees and expenses should be rejected in its entirety.

OTHER ISSUES CONSIDERED & DECIDED

Respondents did not file with the NASD properly executed Submission Agreements but were required to submit to arbitration pursuant to the NASD bylaws as well as Section

12 of the NASD Code of Arbitration Procedure (the "Code"), and having answered the claims, filed counterclaims and being represented by counsel, are bound by the determination of the arbitration panel on all issues submitted.

Respondent Wheat First filed an action in Federal Court requesting declaratory judgment that it had no obligation to arbitrate the above captioned cases against the Claimants under a successor liability theory. The District Court granted summary judgment in favor of Wheat First. The Claimants' appealed this decision and the Eleventh Circuit Court of Appeals unanimously affirmed the District Court's decision. Respondent Wheat First requested that the Panel dismiss Wheat First from these proceedings and Claimants requested that the Panel's dismissal be limited to those claims asserted against Wheat First in its capacity as successor in interest to Marshall Securities. The Panel decided in September 1993 to dismiss all claims asserted against Wheat First, under the theory of successor in interest but determined that Wheat First would remain a valid party to this proceeding by virtue of the claims asserted directly against it.

The Panel in an Interim Order unanimously determined that Respondents Marshall, Thackston, MCS and Mr. Marshall's Motion to Dismiss be granted. The Panel in its Interim Order did not address whether all claims against Wheat First were dismissed and has determined that the claims asserted by Claimants directly against Wheat First are dismissed in their entirety.

The Panel in its Interim Order closed the record on the merits and requested submissions by the parties related to attorneys' fees. The Panel's determination on attorneys' fees is reflected below.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of all issues submitted for determination as follows:

1. That all claims submitted by the Claimants in case numbers 90-00460, 90-00461 and 91-00116; including claims of punitive and RICO damages, are dismissed in their entirety.

2. That Claimants on case numbers 90-00460, 90-00461 and 91-00116 are liable to Respondents for an award of attorneys' fees and expenses and shall pay to Respondents attorneys' fees in the amount of $543,747.50 and out of pocket expenses in the amount of $90,269.77 for a total of $634,017.27. The Panel finds its authority to award attorneys' fees and expenses is derived from three sources. First the parties agreed to submit the issue of attorneys fees and expenses to the Panel so that an enforceable "bi-lateral agreement" exists. *See Matter of U.S. Offshore Inc. (Seabulk Offshore, Ltd.)* 753 F. Supp. 86 (S.D.N.Y. 1990) Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American Rule" *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 421 U.S. 240 (1975); *Dean Witter Reynolds Inc. v. Bork,* 1991 U.S. Dist LEXIS 11907 (E.D. Pa 1991). See also O.C.G.A. Section 9-15-14

3. Any relief not specifically provided for herein is denied in its entirety.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the following Forum Fees are assessed.

64 hearing sessions X $1000 = $64,000 minus hearing session deposits deposited by the Claimants at the time of filing their claim as follows:

> Claimants in Case Number 90-00460 deposited a hearing session fee of $500. Claimant Green deposited a hearing session deposit of $750 in Case Number 90-00461 and Claimant Patton deposited a hearing session deposit of $1000 = leaving a balance $61,750
>
> Claimants in case numbers 90-00460, 90-00461 and 91-00116 paid Interim Forum Fees of $24,000 leaving a balance of $37,750
>
> Respondents also deposited Interim Forum Fees in the amount of $12,000 so that the amount that remains due to the NASD is $25,750.

The Panel has determined that Claimants shall pay the outstanding forum fees in the amount of $25,750 to the NASD and orders Claimants to reimburse directly to Respondents their Interim Forum Fee assessment in the amount of $12,000.

Concurring Arbitrators' Signatures

Name	Public/Industry
/s/ A. Keith Logue A. Keith Logue - Chairman	Public Arbitrator
/s/ James E. Giblin James E. Giblin	Public Arbitrator
/s/ Ronald W. Lankford Ronald W. Lankford	Industry Arbitrator

Date Award Served by the NASD: December 23, 1994

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

(2)

No. 97-972

In The

Supreme Court of the United States

October Term, 1997

PAUL A. DUKE, Individually and As Trustee for TERRI L. STRICKLAND, JEAN F. DUKE, PAUL A. DUKE, JR., C. HUNTER TISON, LAURA D. TISON, RUTH STRICKLAND, HERB STRICKLAND, JON A. PIRTLE, RONALD G. GREEN and MATTHEW H. PATTON,

Petitioners,

vs.

MARSHALL & CO., INC., KENTWOOD BRETT THACKSTON, MARSHALL & CO. SECURITIES, INC. and MICHAEL P. MARSHALL,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PETER W. SCHNEIDER
Counsel of Record
LAURA H. ROBISON
ROGERS & HARDIN LLP
Attorneys for Respondents
2700 International Tower
Peachtree Center
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-4700

27 pp

QUESTIONS PRESENTED

The Respondents do not agree that this case presents the questions identified by the Petitioners. The case presents the following questions:

1. Did the Court of Appeals and the District Court properly conclude that the arbitrators did not exceed their powers, pursuant to 9 U.S.C. § 10(a)(4), when they awarded Respondents attorney's fees as had been requested in the pleadings and stipulated to the arbitration panel as an issue they should decide?

2. Did the Court of Appeals and the District Court properly conclude that the arbitrators did not act arbitrarily or capriciously in awarding the Respondents attorney's fees based on an extensive record which included briefs from all parties specifically addressing the issue of attorney's fees?

3. Did the Court of Appeals and the District Court properly conclude that the arbitrators were not guilty of "misconduct", pursuant to 9 U.S.C. § 10(a)(3), when they denied the last of Petitioners' requests for adjournment of a scheduled session after granting them numerous prior adjournments and giving them alternative opportunities to submit additional evidence?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Petitioner has correctly identified the parties before the Eleventh Circuit. Pursuant to Rule 29.6 of the Rules of this Court, the Respondents submit the following list of all parent companies and nonwholly owned subsidiaries of the corporate Respondents:

Respondent Marshall & Co., Inc.

Parent: None

Subsidiaries: None

Respondent Marshall & Co. Securities, Inc.

Parent: None

Subsidiaries: None

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STATUTES AND REGULATIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* is involved in this case and in particular, 9 U.S.C. § 10, as cited by petitioners.

STATEMENT OF THE CASE

The Respondents do not agree that the Petitioners' Statement of Claim is sufficient to outline the questions presented for review. The Respondents, therefore, provide the following statement:

A. Procedural History

This matter originates from a consolidated arbitration proceeding before a three-member panel of arbitrators from the National Association of Securities Dealers ("NASD"). The arbitration began on February 13, 1992 and ended on December 23, 1994, with an award in favor of Respondents.

After 58 arbitration sessions Petitioners' case was closed, and the arbitration panel ("Panel") granted Respondents' motion to dismiss the claims in an Interim Award dated August 9, 1994. At the Panel's direction, the parties then submitted briefs on the question of attorney's fees. On December 23, 1994, the arbitrators issued a Final Award affirming their earlier decision to dismiss and awarding Respondents attorney's fees and costs. (Appendix to Petition, p. 9a).

Shortly thereafter, Respondents filed a Petition to Confirm Arbitration Award in United States District Court for the Northern District of Georgia, and Petitioners answered and cross-moved to vacate. On July 26, 1995, the district court granted Respondents' petition to confirm and denied Petitioners' motion to vacate. After considering motions to alter or amend the judgment filed by both parties (Respondents' motion sought to add pre-judgment interest)

the court entered an amended judgment on April 1, 1996, including the pre-judgment interest.

The Petitioners appealed to the Eleventh Circuit Court of Appeals which affirmed the judgment of the District Court on June 10, 1997, and on September 11, 1997 denied the Petitioners' request for rehearing *en banc*.

B. Factual Background

1. Parties and Pre-Hearing Events

This matter arises out of the unanimous decision of three arbitrators to award Respondents a portion of the attorney's fees and expenses they incurred defending frivolous securities fraud allegations. The Panel reached its decision after a review of the evidence — including the testimony of 19 witnesses in 58 hearing sessions — and careful consideration of the law. The transcript of the proceeding alone filled over 6,000 pages. (Appendix to Petition, p. 9a).

The Petitioners in this case include Paul A. Duke, Jean F. Duke, Paul A. Duke, Jr., C. Hunter Tison, Laura D. Tison, Ruth Strickland, Herb Strickland, Jon A. Pirtle and Paul A. Duke, as Trustee for Terri L. Strickland (collectively referred to herein as "the Dukes"), members of a wealthy Atlanta family, who filed an arbitration claim (NASD Case No. 90-00460) in January 1990. Shortly thereafter, Ronald G. Green, an Atlanta entrepreneur, commenced a similar arbitration (NASD Case No. 90-00461). Approximately one year later, Matthew H. Patton, a senior litigator at a large Atlanta law firm, filed his own claim in January 1991 (NASD Case No. 91-00116). Pursuant to an agreement of the parties, the NASD consolidated the three arbitrations into a single proceeding. (R1-5, R1-1, Att. 3).[1]

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1. Citations in the form "R-__" are to the record before the Eleventh Circuit Court of Appeals.

The Respondents in the case include Marshall & Co. Securities, Inc., where Petitioners held brokerage accounts and Marshall & Co., Inc., a holding company. Brett Thackston served as Petitioners' stockbroker at Marshall Securities for many years. Michael P. Marshall was the President of Marshall Securities during the relevant time period and was also one of the firm's eleven managing directors. (R1-5, Tr. at 5321, 5326; 123, 132-35).

The Panel consisted of two attorneys, A. Keith Logue, Esq. (chairman) and James R. Giblin, Esq., and Mr. Ronald Lankford, a securities professional (R1-5, Tr. 3), arbitrators who had presided over at least 16 arbitrations. The arbitrators' authority to hear the case was based on Uniform Submission Agreements signed by Petitioners. The NASD Code of Arbitration Procedure ("NASD Code") governed the proceeding as supplemented by a "Joint Preliminary Statement and Scheduling Order" ("Joint Scheduling Order") submitted on consent by the parties. (R1-5).

2. Petitioners' Claims

Petitioners pursued three basic claims, all involving their investment in a Florida-based telecommunications company called Central Corporation ("Central"). First, they alleged that Mr. Marshall conspired with another Atlanta businessman to engineer a "sham bankruptcy" of Central in November 1988 to the detriment of hundreds of Marshall Securities' customers holding Central stock, including Petitioners. Petitioners argued Mr. Marshall's alleged actions were motivated by a secret scheme to transfer Petitioners' equity interests to himself and his associates. Second, Petitioners claimed Mr. Thackston charged them unlawful prices for Central stock. Specifically, they asserted he marked-up the price of the stock beyond the NASD's guidelines. Third, they claimed Mr. Thackston misled them about Central's financial condition, prompting their repeated purchases of the stock from 1984-1989. Petitioners asserted that, without these alleged

misrepresentations, they would have sold their stock for a sizeable profit prior to the October 1987 stock market crash. (R1-5 Tr. 35-36, 40-41, 2449-50).

After hearing Petitioners' witnesses and reviewing the exhibits, the Panel found that *nothing* supported these contentions. Mr. Marshall acquired his interest in Central in a transaction approved by the bankruptcy court. Central's Board of Directors made the decision to file bankruptcy, *not* Marshall Securities. Petitioners' equity in the company was not transferred to Mr. Marshall, it went to the company's creditors and new owners pursuant to a court-approved reorganization plan. Far from being charged too much, Petitioners received *discounts* on their commissions. Evidence offered at the hearing showed that the NASD specifically had reviewed Mr. Thackston's trades and found them to be well within acceptable markups. Finally, the evidence revealed Petitioners *knew* about Central's financial condition. Moreover, Mr. Thackston's statements about Central — many of which were recorded surreptitiously by Mr. Patton (who secretly taped over 130 telephone conversations with Mr. Thackston and other Marshall Securities employees) were completely accurate, even when evaluated with the glare of hindsight. (R1-5, Tr. 170, 649, 857, 4561, 4690, 5260 5317-5565, 5774).

3. Petitioners' Adjournment History

During the course of the arbitration, Petitioners called a total of 19 witnesses and submitted 26 volumes of exhibits. Ms. Strickland, Mr. and Mrs. Duke, Mr. and Mrs. Tison, Paul Duke, Jr., Mr. Green and Mr. Patton all testified, often for multiple sessions. From time to time, they also furnished the Panel with legal memoranda or summaries of their position. Their case occupied 58 sessions over 31 days. From beginning to end, the arbitration lasted *five* years. (R1-5).

The Panel bent over backwards to accommodate Petitioners' schedules. In total, Petitioners requested that almost 22 days of hearing be rescheduled and obtained 16½ days worth of adjournments as their case-in-chief stretched over a two-year period. Petitioners offered a laundry list of reasons for cancelling a session, including some as far-fetched as the "Blizzard of '93" (which occurred over a weekend). (R2-6, chart, p. 18-19).

Tired of the delays, the NASD asked the parties for available session dates in late 1993 and early 1994 to finish the arbitration. In a January 27, 1994 letter, Petitioners informed the NASD that they were "unfortunately" unavailable for the hearing during 115 of the 118 business days between January 27 and July 1994. Shortly thereafter, they informed the NASD that they were no longer available for the three days they previously had identified as open. Respondents presented evidence to the Panel that Petitioners were delaying the arbitration intentionally, as part of an overall plan to force a favorable settlement by waging a war of attrition. (R2-6, Vol. "Selected Correspondence")

4. The April 14-16 Dates

Following a conference call on February 23, 1994, the Panel scheduled a session for April 14-16, 1994, dates specially selected by *Petitioners*. In that call, William Sumner, one of Petitioners' counsel, agreed either to be present for these sessions or to have another attorney from his office there to present evidence. In a special Order dated March 23, 1994, the Chairman confirmed the Panel's prior direction that Petitioners "will complete their case in chief with their final witnesses whose names have been previously provided to Respondents". (R2-6).

By that time, Petitioners could identify only four more witnesses whom they might call. Prior to the April 14 session, Petitioners narrowed their witness list to just one "half-day" witness,

Stuart Lewis, a Texas resident. Petitioners failed, however, to secure Mr. Lewis for this session. In fact, Respondents' investigation revealed that Petitioners had only contacted Mr. Lewis the week before the session. *Id.*

Even though they appeared at the April sessions without a witness, the Panel informed Petitioners they could supplement the record, if they wished, with affidavits or deposition testimony from Mr. Lewis. The Panel said they would meet on April 15 and 16 if Petitioners desired to present a live witness. The Panel also set a briefing schedule for Respondents' motion to dismiss. Petitioners never objected to this schedule nor did they file a protest with the Panel — or with a court — concerning the denial of their postponement request.

5. The Award

On May 2, 1994, after Petitioners' case had ended, Respondents filed a motion to dismiss, supporting it with a lengthy memorandum of law. Petitioners responded to the motion with a 91-page brief of their own, as well as host of exhibits. On August 22, 1994, the Panel entered an "Interim Order," which granted Respondents' motion. In the Interim Award, the Panel stated it was considering awarding attorney's fees to Respondents. The Panel requested the parties to "provide statutory authority and/or case law demonstrating an arbitration panel's authority to render attorney's fees." It also asked Respondents to submit proof of their fees and expenses. (R1-5).

In response, Respondents submitted numerous affidavits, attesting to the amount and reasonableness of the fees sought. They also submitted a memorandum and reply memorandum of law discussing the Panel's authority to award attorney's fees and expenses. Petitioners opposed the motion. They, too, filed a lengthy brief, though they never submitted any affidavits or expert testimony disputing the amount or reasonableness of the fees requested. (R1-5).

On December 23, 1994, the Panel entered its Final Award. It affirmed its earlier dismissal of Petitioners' claims, and assessed $634,017.27 in attorney's fees and expenses and $64,000 in forum charges against Petitioners and in favor of Respondents. The award specifically recited the background facts and the Panel's authority to award attorneys fees and expenses. (Appendix to Petition, pp. 25a-37a).

REASONS FOR DENYING THE WRIT

The Court should deny certiorari because Petitioners' only real ground is that they are unhappy with the Panel's decision. They are simply arguing that the Panel made erroneous factual findings and misapplied the law — factors that do not justify the granting of petition for certiorari. The Petitioners' arguments to this Court are the same as those raised in the lower courts. The Petitioners are unhappy with the arbitrators' decision and they want the Court to substitute its judgment for that of the Panel. The courts below correctly rejected Petitioners' arguments, and instead applied settled case law, including decisions of this Court, that set out the standard for reviewing arbitration awards. In so doing, the District Court and the Court of Appeals properly refused to second-guess the Panel and confirmed the arbitration award.

In short, this case involves the routine review of an arbitration award; there is no issue that warrants review by this Court. For example, the Petitioners have not and cannot argue that there is a split in authority regarding the issues in this case. The law governing the review of arbitration awards is not in conflict and, in fact, recently was addressed by this Court in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995). And this legal standard was applied and followed by the lower courts in confirming the award.

The only ground put forth by Petitioners to support their petition is that the arbitration process is somehow "unfair" because

the arbitrators ruled against them. However, this Court has addressed the validity of the arbitration process for hearing claims such as this one. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (holding that the arbitrators are "capable" of determining federal securities law claims and the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights"). And the arguments put forth by Petitioners provide no ground for further elucidation of the Court's earlier ruling. Moreover, as the lower courts correctly found and as discussed below, the arbitration process was fair to Petitioners and the arbitrators' actions were supported by the record and facts of the case.

I.

THE COURT OF APPEALS APPLIED THE CLEAR AND PROPER STANDARD IN REVIEWING THE ARBITRATION AWARD.

No conflict exists regarding the appropriate standard to apply to the review of an arbitration award. As this Court recently noted, a court should give "considerable leeway" to an arbitrator's ruling, setting aside his or her decision only in certain narrow circumstances. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 943. Thus, a court's review of the arbitration process is "severely limited" and "the Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards. . . ." *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *overruled on other grounds*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 948-949.

Courts hearing motions to vacate "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Advest, Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990) (citation omitted). Arbitration awards cannot be overturned merely because the reviewing court may disagree

with the arbitrator's conclusion or may believe a different decision is better. *See Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir. 1994). Judicial intervention under the FAA is so narrow that,

> [t]he statute does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitrators or the parties.

Robbins v. Day, 954 F.2d at 683. Given this limited review, a court must not second-guess a panel's rulings. "Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993). In reviewing arbitral awards, a court is supposed to determine "whether the arbitrators did the job they were told to do — not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Remmey v. PaineWebber, Inc.*, 32 F.3d at 146 (citations omitted).

Both the District Court and the Court of Appeals followed these standards in reviewing the arbitration award.

II.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE ARBITRATORS HAD THE AUTHORITY TO AWARD RESPONDENTS ATTORNEY'S FEES.

The Panel set forth three sources for its authority to award attorney's fees:

> First the parties agreed to submit the issue of attorneys' fees and expenses to the panel so that an

> enforceable "bilateral agreement" exists . . . Second, the NASD rules and the Uniform Submission Agreement executed by Claimants provide for submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the "American rule".

(Appendix to Petition, p. 36a) (citations omitted).

While the Panel identified its authority to award attorney's fees, it chose not to discuss its rationale for the award. Arbitrators are not required to do so. *See, e.g., Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993) ("Arbitrators need not give reasons for their determinations.")

A challenge to an arbitration award on the basis that an arbitration panel has exceeded its authority turns on whether the arbitrators had the *power* to decide an issue submitted to them. As the Court of Appeals correctly stated, "[o]nly once source of authority is necessary to affirm the decision." (Appendix to Petition, p. 4a). In reviewing an award pursuant to a Section 10(a)(4) challenge, courts examine whether there was any basis whatsoever for permitting the panel to rule, with all doubts concerning the arbitrability of an issue resolved in favor of finding the authority. *Willoughby Roofing and Supply Co. v. Kajima Int'l, Inc.*, 776 F.2d 269 (11th Cir. 1985). Further, while arbitrators should not act in a "wholesale departure from the law", they are allowed to interpret the law and the scope of their authority expansively. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("[A]rbitrators do have the power to fashion equitable relief").

Significantly, although they are claiming the Panel lacked all authority to award fees, Petitioners have undercut this argument by acknowledging in their filings in the lower courts that the Panel had at least one basis upon which fees could be awarded — a finding

of bad faith. One of the three grounds on which the Panel based its attorney's fees award was the "bad faith exception" to the American Rule. In relying on that legal basis, the Panel cited specifically to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) and *Dean Witter Reynolds, Inc. v. Bork*, No. 91-0392, 1991 U.S. Dist. LEXIS 11907 (E.D. Pa. Aug. 20, 1991). These two decisions recognize that arbitrators have the power to award attorney's fees as a means to protect the integrity of the arbitration process.

Petitioners do not dispute that the "bad faith exception" to the American Rule is a proper source of authority for the arbitrators to grant fees. (Petitioners' Eleventh Circuit Br. at p. 24). They have never argued, nor can they, that the Panel exceeded its powers by relying on the bad faith exception. They simply disagree with the Panel's determination under that authority.

This concession ends the analysis. A panel either has the power to make a ruling or it lacks the power. Where, as here, a party concedes that the panel was executing authority it rightfully possessed, there can be no claim for vacatur under Section 10(a)(4) of the FAA. This is true even if the arbitrators improperly interpreted or misapplied the law. *J.A. Jones Construction Co. v. Flakt, Inc.*, 731 F. Supp. 1061, 1064 (N.D. Ga. 1990) (arbitrators do not "exceed their powers" by making a decision contrary to law, but rather only if "they rule on matters outside of their proper consideration.")

The Court of Appeals also correctly found that the parties submitted the issue of attorney's fees to the Panel by agreement. (Appendix to Petition, p. 4a). Where the parties jointly submit the issue of attorney's fees and expenses for decision by an arbitration panel, this submission constitutes an enforceable *bilateral agreement* which allows the panel to award such fees. *E.g.*, *Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.)*, 753 F. Supp. 86 (S.D.N.Y. 1990). An agreement to arbitrate "vests the arbitrators

with powers as broad as the agreement explicitly or implicitly provides." *Reyes Compania Naviera S. A. v. Manumante S. A.*, 649 F. Supp. 789, 791 (S.D.N.Y. 1986); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrators can decide age discrimination claim).

Once the parties decide to arbitrate, they can submit any issue they desire for a ruling. "[I]t is hornbook law that parties by their conduct may agree to send issues outside an arbitration clause to arbitration." *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228, 231 (2d Cir. 1982). If a party voluntarily submits an issue to arbitration, that party cannot later argue the arbitrator lacked authority to resolve the dispute just because he is displeased with the outcome. *International Longshoremen's Ass'n, AFL-CIO v. Hanjin Container Lines, Ltd.*, 727 F. Supp. 818, 821 (S.D.N.Y. 1989).

Here, the parties in their individual pleadings and in a Joint Scheduling Order expressly requested the Panel to award attorney's fees and expenses as part of its final judgment. (R1-5). Respondents' counterclaim requested fees on the grounds that the "allegations contained in the Statement of Claims are substantially without justification, frivolous, lack a factual or legal basis and, on information and belief, were asserted in bad faith." *Id.* No objection to the counterclaim was lodged. Shortly after the arbitration began, Respondents filed an Amended Counterclaim pursuant to an Order of the Panel. The Amended Counterclaim asserted a claim for attorney's fees detailing in 10 pages the misconduct which justified such an award. (R1-5). Moreover, at the time the Amended Counterclaim was filed, the Chairman stated that the Panel would hear it, adding, "Is that agreeable to all the parties?" Petitioners' counsel, Mr. Sumner replied, "So stipulated." (R1-5, Tr. at 380).

These various submissions reflect the parties' intent to authorize the Panel to award attorney's fees and expenses. No party

objected to the Panel's authority or jurisdiction to decide fee requests. The case of *Matter of U.S. Offshore, Inc. (Seabulk Offshore, Ltd.)*, 753 F. Supp. 86 (S.D.N.Y. 1990) is on point. In that case, the parties each had included a prayer for costs and attorney's fees in their pleadings. The Court of Appeals held that these requests constituted a bilateral agreement to arbitrate the attorney's fee dispute and, therefore, upheld the grant of fees by the Panel. *Id.* at 92. *Accord, First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105, 112 (S.D.N.Y. 1994); *Teamsters Local Union No. 764 v. J. H. Merritt & Co.*, 770 F.2d 40 (3d Cir. 1985) (and other authorities cited to the Court of Appeals).

Further, although Petitioners argue that attorneys fees may be awarded "only when the contract expressly *includes* an express authorization," citing *Matter of Prudential-Bache Sec., Inc. and Depew*, 814 F. Supp. 1081, 1084 (M.D. Fla. 1993) (emphasis in original), this position is plainly contradicted by decisions of this and other courts. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that arbitrators may award punitive damages under arbitration agreement providing simply that "any controversy" is subject to arbitration); *Ierna v. Arthur Murray Int'l*, 833 F.2d 1472, 1476-77 (11th Cir. 1987) (upholding award of attorney's fees by arbitrators and noting "Courts are not to vacate arbitral awards except in the rare instances when the arbitrators . . . exceed a specific contractual *limitation* on the scope of their authority") (emphasis added); *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1202 (2d Cir. 1996). Further, this Court has mandated that any doubts about coverage of a particular dispute should be resolved in favor of arbitration. *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Thus, a contract must contain an express *limitation* on an arbitrator's authority to award attorney's fees before that power is taken from them.

The Court of Appeals was correct in holding that the arbitrators had the power to make the award of attorney's fees.

III.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE AWARD OF ATTORNEY'S FEES WAS NOT ARBITRARY AND CAPRICIOUS.

The Panel entered a unanimous award of attorney's fees and expenses after hearing the evidence and considering hundreds of pages of briefs from the parties. Petitioners challenge the award claiming, under a narrow, judicially-created ground that, despite the Panel's careful consideration of the case, the award nevertheless was "arbitrary and capricious." *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781 (11th Cir. 1993) (recognizing arbitrary and capricious standard but finding it was not satisfied even where court knew that the panel misinterpreted a Florida statute). Unfortunately, parties often use recognized grounds to vacate an arbitration award "as a ruse to obtain judicial review on the merits of an arbitral award." *Flender Corp. v. Techna-Quip, Co.*, 953 F.2d 273, 278 (7th Cir. 1992).

An award may be found "arbitrary and capricious" only if "a ground for the arbitrator's decision can[not] be inferred from the facts of the case." *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) (citations omitted); *O.R. Securities, Inc. v. Professional Planning Assoc., Inc.*, 857 F.2d 742, 746 (11th Cir. 1988) (award should be confirmed where any colorable justification supports it). To establish that an award is arbitrary and capricious, "[t]he onus . . . upon the party requesting the vacatur to refute . . . every rational basis upon which the arbitrator could have relied." *Robbins v. Day*, 954 F.2d at 684.

This is an extremely high standard. For example, an appeal from a judicial finding of bad faith cannot be overturned unless "clearly erroneous". *Perichak v. International Union of Elec. Radio and Mach. Workers*, 715 F.2d 78, 79 (3d Cir. 1983) ("finding of

'bad faith' . . . in a particular case is a factual determination and may be reversed only if it is clearly erroneous"). But an even higher hurdle faces a party challenging an arbitral award of attorney's fees. Identification of facts that tend to undermine the ruling is insufficient — a party challenging a panel's conclusion bears the burden of proving that the arbitrators' reasoning was so "palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Safeway Stores v. American Bakery and Confectionery Workers Int'l Union, Local 111*, 390 F.2d 79, 82 (5th Cir. 1968); *Advest, Inc. v. McCarthy*, 914 F.2d at 8. *Compare Ainsworth v. Skurnick*, 909 F.2d 456, 462 (11th Cir. 1990) (vacating award where violation of Florida's Blue Sky Law was the "only reasonable conclusion to be drawn from the facts".)

Petitioners failed to meet this burden. Although Petitioners point to isolated instances which they claim support the Panel's belief in the merits of their claims, this fails to meet the test. It is obvious from the Panel's grant of Respondents' Motion to Dismiss that they believed Petitioners case had *no* merit. Further, the Panel decided to award attorney's fees based on their first-hand review of the evidence submitted and their own observations of the Petitioners' conduct. In deciding to award fees, the Panel considered this evidence as well as facts showing Petitioners *knew* their claims lacked merit before they brought them. Indeed, the arbitration record, fairly construed, revealed that Petitioners had filed an opportunistic arbitration claim in bad faith, hoping to use the high cost of defense as a weapon to extort from Respondents a favorable and undeserved settlement. Both the District Court and the Court of Appeals properly deferred to the arbitrator's decision in this case, relying upon the extensive record which supported the arbitrators' finding. (Appendix to Petition, p. 4a).

Moreover, the lower courts correctly upheld the award of attorney's fees jointly and severally against Petitioners since Petitioners made no effort to distinguish among themselves in their

claims and not one defendant stepped forward to disavow the tactics being pursued in the arbitration. The lower courts found sufficient support in the arbitration record for such a joint and several award, as explained by the District Court:

> The panel concluded that each and every defendant had failed to adduce any evidence in support of any of their claims. The panel appears to have concluded as had been suggested to it by plaintiffs, that the defendants were joint venturers in what the panel concluded was frivolous, bad faith litigation that had been pursued for an improper purpose from the start. The Court will not now second-guess the judgment of the panel under the guise of a determination that the panel's action was "arbitrary and capricious."

(Appendix to Petition, p. 24a).

Further, courts have found no fault with such "lump sum" awards. *Sidag Aktiengesellschaft v. Smoked Foods Prods. Co.*, 960 F.2d 564, 567 (5th Cir. 1992) (awarding lump sum attorney's fees against multiple plaintiffs); *Brady v. Hartford Fire Ins. Co.*, 610 F. Supp. 735 (D. Md. 1985) (assessing attorney's fees jointly and severally against parties); *Robbins v. Day*, 954 F.2d at 684 ("[A]n arbitration award that only contains a lump sum award is presumed to be correct").

Accordingly, the Court of Appeals correctly found that the Panel's attorney's fee award was not arbitrary and capricious.

IV.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE ARBITRATORS WERE NOT GUILTY OF MISCONDUCT IN FAILING TO GRANT PETITIONERS AN ADDITIONAL ADJOURNMENT.

It is well-settled that arbitrators enjoy wide latitude in conducting arbitration hearings and broad discretion in deciding procedural questions such as whether to grant or deny requests for a postponement. *Schmidt v. Finberg*, 942 F.2d 1571 (11th Cir. 1991); *Robbins v. Day*, 954 F.2d at 685. Vacatur of an award for refusing to hear evidence is rare. *A.G. Edwards & Sons, Inc. v. McCullough*, 764 F. Supp. 1365 (D. Ariz. 1991), *reversed on other grounds*, 967 F.2d 1401 (9th Cir. 1992). Before a challenge on that basis can be sustained, a party must show that the arbitrators' refusal to hear evidence or postpone a hearing was without any reasonable basis and it so affected the rights of the party as to deprive them of a fair hearing. *National Post Office v. United States Postal Service*, 751 F.2d 834, 841 (6th Cir. 1985); *Concourse Beauty School, Inc. v. Polakov*, 685 F. Supp. 1311, 1318 (S.D.N.Y. 1988).

It is beyond question that Petitioners had a full and fair opportunity to present their arguments and evidence. The Panel permitted Petitioners to present 19 witnesses over 58 hearing sessions. Further, Petitioners fully briefed their claims on Respondents' motion to dismiss, without once contesting the Panel's denial of their adjournment request. Indeed, to this day they have never made an offer of proof of the evidence they contend they were denied from presenting.

Under these facts, it can hardly be argued that other claimants would be discouraged from arbitrating because they believe they would not be given adequate time or opportunity to present their case, as Petitioners suggest.

CONCLUSION

For the reasons given above, certiorari should not be granted.

Respectfully submitted,

PETER W. SCHNEIDER
Counsel of Record
LAURA H. ROBISON
ROGERS & HARDIN LLP
Attorneys for Respondents
2700 International Tower
Peachtree Center
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-4700